Lim Kim Poh v Public Prosecutor

HIGH COURT (SHAH ALAM) — CRIMINAL APPLICATION NO 44-1 OF 2000
KANG HWEE GEE J
22 MARCH 2000

Criminal Procedure *— Sentence — Appeal against sentence — Change of plea in hope of being bound over instead of imprisonment — Offence of armed gang robbery — Appellant sentenced to imprisonment of six years and five strokes of rotan — Slight irregularity in charge framed against appellant — Incorporation of s 34 of Penal Code to charge was superfluous — Whether charge was legal — Whether appellant should be bound over under s 173A or s 294 of Criminal Procedure Code instead*

The appellant was charged with the offence of committing armed gang robbery contrary to ss 395 and 397 read with s 34 of the Penal Code. He pleaded guilty to the charge and was sentenced to a term of imprisonment of six years and five strokes of the rotan. The sessions court judge in passing the sentence took into consideration two other outstanding offences of robbery committed by the appellant. The appellant appealed on the grounds that: (i) the appellant had been induced to change his plea from not guilty to guilty. He had pleaded guilty in the hope of being bound over for the offence he had committed and had not understood the nature and consequence of his plea; (ii) the sessions court judge ought to have bound over the appellant under either s 173A or s 294 of the Criminal Procedure Code (FMS Cap 6); and (iii) the sentence imposed by the sessions court judge was too high.

Held, dismissing the appeal:

(1) There was hardly any material of substance for the sessions court to consider not to impose the sentence of imprisonment and whipping as required by law and to act under s 173A or s 294 of the Criminal Procedure Code instead. The offence committed by the appellant was a sufficiently grave act that required the sessions court to place public interest above all other personal considerations of the appellant. The sessions court judge was therefore justified to have rejected the plea that the appellant be bound over under s 173A or s 294 of the Criminal Procedure Code (see p 416E–G).

(2) The sentence of six years imprisonment and five strokes of the rotan imposed by the sessions court judge, taking into consideration two other offences of the same nature committed by the appellant, would not under the circumstances be excessive and therefore should not be disturbed (see p 417F–G).

(3) The incorporation of s 34 of the Penal Code was under the circumstances of the case superfluous. However, the slight irregularity should not affect the legality of the charge as it was clear that the appellant could not have been misled by the redundant use of s 34 (see p 417H–I).

[Bahasa Malaysia summary

Perayu dipertuduhkan dengan kesalahan melakukan rompakan berkumpulan bersenjata bertentangan dengan ss 395 dan 397 dibaca dengan s 34 Kanun Keseksaan. Beliau mengaku salah dan dihukum penjara selama enam tahun dan lima sebatan rotan. Hakim mahkamah sesyen dalam menjatuhkan hukuman mengambil kira dua kesalahan rompakan yang lain yang dilakukan oleh perayu. Perayu membuat rayuan berdasarkan alasan bahawa: (i) perayu telah didorong supaya menukar akuannya daripada tidak bersalah kepada bersalah. Beliau telah mengaku salah dengan harapan diikat (bound over) untuk kesalahan yang dilakukannya dan tidak memahami sifat dan akibat rayuannya; (ii) hakim mahkamah sesyen sepatutnya telah mengikat perayu sama ada di bawah s 173A atau s 294 Kanun Acara Jenayah (FMS Cap 6); dan (iii) hukuman yang dijatuhkan oleh hakim mahkamah sesyen adalah amat melampau.

Diputuskan, menolak rayuan tersebut:

(1) Tidak terdapat apa-apa bahan material untuk dipertimbangkan oleh mahkamah sesyen supaya tidak mengenakan hukuman penjara dan sebat seperti yang dikehendaki oleh undang-undang dan untuk bertindak sebaliknya di bawah s 173A atau s 294 Kanun Acara Jenayah. Kesalahan yang dilakukan oleh perayu merupakan tindakan yang cukup serius hinggakan mewajarkan mahkamah sesyen untuk meletakkan kepentingan umum di atas pertimbangan peribadi perayu yang lain. Dengan itu, hakim mahkamah sesyen berjustifikasi dalam menolak rayuan agar perayu diikat di bawah s 173A atau s 294 Kanun Acara Jenayah (lihat ms 416E–G).

(2) Hukuman penjara selama enam tahun dan lima sebatan rotan yang dikenakan oleh hakim mahkamah sesyen, dengan mengambil kira dua kesalahan sama jenis yang lain yang dilakukan oleh perayu, tidaklah melampau di bawah keadaan ini dan dengan itu tidak harus diganggu (lihat ms 417F–G).

(3) Penggabungan s 34 Kanun Keseksaan adalah berlebihan di bawah keadaan kes ini. Namun demikian, luar aturan yang sedikit ini tidak harus menjejaskan kesahihan pertuduhan kerana ia adalah jelas bahawa perayu tidak mungkin telah diperdaya oleh penggunaan berlebihan s 34 (lihat ms 417H–I).]

Notes

For cases on appeal against sentence, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2516–2538.

Legislation referred to

Criminal Procedure Code (FMS Cap 6) ss 156, 171A, 173, 173A, 294

Penal Code ss 34, 391, 395, 397

A *Christopher Fernando* (*Aris Rizal Christopher Fernando & Co*) for the appellant.

Zakaria Merican bin Ishak Merican (Deputy Public Prosecutor) for the respondent.

Kang Hwee Gee J: The appellant was charged jointly with another B accused before the sessions court with the offence of committing armed gang robbery with three other persons still at large contrary to s 395 read with s 397 of the Penal Code.

The charge read as follows:

> C Bahawa kamu bersama tiga lagi 'suspect' yang masih bebas pada 25 Disember 1997 jam lebih kurang 2005 jam di alamat No 63, Jalan Merpati, Taman Setia Jaya, Banting dalam daerah Kuala Langat di negeri Selangor dengan niat bersama didapati telah melakukan kesalahan rompak berkawan dan bersenjata terhadap seorang lelaki Cina nama Tan Fong Wui K/P 740911–10–5473 dan telah merompak barang kemas lebih kurang RM50,000 dan semasa melakukan rompakan tersebut kamu telah menggunakan senjata D pisau. Oleh itu kamu telah melakukan satu kesalahan di bawah s 395/397 kanun keseksaan dibaca bersama s 34 undang-undang yang sama.

He pleaded guilty to the charge and was sentenced to a term of imprisonment of six years and five strokes of the rotan.

The sessions judge in passing the sentence took into consideration two E other outstanding offences of robbery (in cases SA1 62–5–98 and SA1 62–7–98) committed by the appellant which was pending trial in the same court under s 171A of the Criminal Procedure Code (FMS Cap 6).

The facts of the case was given as follows:

> F Pada 25 Disember 1997 jam 8.15 malam, pengadu semasa bertugas di bilik gerakan IPD Kuala Langat telah menerima satu panggilan talipon mengatakan ada satu kejadian samun berlaku di sebuah rumah di No 63, Jalan Merpati, Taman Setia Jaya, Banting. Bertindak di atas maklumat tersebut pihak polis telah melakukan satu serbuan ke rumah tersebut. Polis telah berjaya menahan tertuduh bersama seorang rakannya yang lain. Dalam tangkapan tersebut, pihak polis telah berjaya menemui semula barang-barang G berikut:
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> (1) lapan bentuk cincin;
> (2) Wang tunai RM460;
> (3) US Dollar 180;
> (4) satu besi kuku kambing;
> H (5) satu plier;
> (6) satu ikat anak kunci;
> (7) satu handphone; dan
> (8) satu topi.
>
> I Siasatan telah dijalankan setelah dibuat pengecaman ke atas barang-barang yang dijumpai pada milik tertuduh dan rakannya. Mangsa telah mengatakan bahawa barang-barang tersebut adalah kepunyaan mereka dan telah disamun oleh tertuduh dan rakannya. Mengikut keterangan mangsa kejadian itu berlaku pada 25 Disember 1997 jam lebih kurang 8.00 malam di alamat

No 63, Jalan Merpati, Taman Setia Jaya, Banting. Semasa kejadian tersebut, mangsa bersama dua pembantu rumah berada di dalam rumah. Tiba-tiba masuk lima orang lelaki Cina dari arah pintu belakang. Semua lelaki tersebut bersenjatakan pisau. Setelah mengikat mangsa-mangsa, mereka memasukkan mangsa-mangsa ke dalam sebuah bilik dan mengunci. Penjenayah telah menggeledah rumah dan melarikan barang-barang kemas dan barang berharga.

The grounds as amended in the petition were not properly organized. But in so far as they can be understood may be summarized as follows:

(1) The appellant had been induced (didorong) to change his plea from not guilty to guilty. He had pleaded guilty in the hope of being bound over for the offence he had committed and had not understood the nature and consequence of his plea. This is evident from the notes of evidence which shows that he had pleaded guilty only after a few adjournments.

(2) The sessions court judge ought to have bound over the appellant under either s 173A or s 294 of the Criminal Procedure Code (FMS Cap 6) considering that the appellant was a first offender, young age of the appellant, the passive part played by him in the robbery, the favourable probation report submitted, and the fact that he had pleaded guilty thereby saving much time and costs and had regretted what he had done.

(3) He had come to the wrong conclusion that:

  (i) the victim was put in danger by the use of offensive weapons as no weapons was recovered from the scene; and

  (ii) the value of the property involved in respect of each charge was RM50,000 RM150,000 and 28,000 respectively whereas the amount recovered at the scene in this charge was much less.

(4) The sentence imposed by the sessions court judge was nevertheless too high thereby giving rise to the inference that he had failed to properly:

  (i) consider the mitigation plea of the appellant;

  (ii) make an inaccurate assessment of fact and law with respect to public interest; and

  (iii) consider the probation report, the authorities submitted and to apply the correct sentencing principle on youthful offenders.

RULINGS

Having considered the grounds and the submissions of counsel for the appellant and the deputy public prosecutor, my rulings are as follows:

Being induced to plead guilty — expectation of being bound over

A perusal of the notes recorded by the sessions court judge discloses that the appellant had pleaded guilty after the charge had been read and explained

to him by the court and that he had understood the nature and consequence of his plea — and at the time when he made the plea he was properly represented by counsel.

All fairness I do not think one can accept the open ended submission without more that the appellant must have been induced into pleading guilty merely from the fact that he had all along claimed trial and therefore must have been induced into pleading guilty and that he would not have changed his plea had he not been induced into thinking he would be bound over.

The submission raises the question of who induced him and in what manner was he induced.

Binding over under s 173A or s 294 of the Criminal Procedure Code (FMS Cap 6)

Principles governing binding over an offender

See the following commentaries in *Mallal's Criminal Procedure* (5th Ed, 1998):

> [9626] Before s 294 will apply, certain conditions need to be satisfied. Firstly an adult offender must have been convicted for an offence punishable with imprisonment. Secondly it must appear to the court, regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed, that it is expedient that the offender be released on probation of good conduct. Section 294 may be invoked in the case of an offender who was a youthful offender at the time of commission of offence but has since ceased to be one at the time of sentencing or appeal.
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> [9628] The provisions of s 294 CPC do not allow any court to go to the length of saying that in every case of a first offender the antecedents of the convicted person are necessarily such as to make it expedient to bind him over. Each individual case must be considered on its own merits and must be examined with a view to ascertaining whether, having regard to any of the matters mentioned in s 294, binding over is in all the circumstances of the case expedient.
>
> [9629] Where a person has been convicted the court may release him on bound, having regard to 'extenuating circumstances' under which the offence was committed. It appears that extenuating circumstances may be deduced from the facts of the case itself. In *Tan Tek Seng @ Tan Chee Meng v PP* [1990] 2 CLJ 103 the appellant was charged with two counts of CBT under section 409 of money belonging to the Jabatan Pelajaran Johor. He was convicted of both counts and sentenced to six months imprisonment in respect of each charge. On appeal to the High Court, Richard Tallala JC found that the appellant had acted out of 'sheer stubbornness and cussedness', according to the learned judicial commissioner:
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> > 'He took the money, not stealthy, but openly, in the presence of the clerk in the school office. He did not spend the money but kept it in his house. He eventually returned it to the Department in full. Unfortunately he told

a lie in answer to the request for payment and kept the money too long. I do not see much criminality in the appellant's action or more appropriately I should say the offences were committed under extenuating circumstances.' A

Thus the conviction and sentence was set aside and the appellant was discharged conditionally upon his entering into a bond of $5,000 without sureties under s 173A CPC. In *PP v Fam Kim Hock* [1957] MLJ 20, the fact that the manager's son had almost instructed the offender to commit irregularities was taken into account by the court when binding over the offender under section 294 CPC. B

QUESTION: IS IT EXPEDIENT TO BIND OVER THE APPELLANT? C

The appellant was aged 20 when he committed the offence — well past the age of criminal responsibility. He was not a first offender considering that he had also committed the same offence in the other two charges. There was also no extenuating circumstances that led him to commit the present offence and the two offences that had been taken into consideration by the sessions court. D

All that the probation report showed was the fact that he had come from a reasonably decent family, that he had left school at the mid secondary level, that he had been employed as a car repairer with a salary of RM800 per month and that he had regretted for having committed the offence. There was hardly any material of substance for the sessions court to consider not to impose the sentence of imprisonment and whipping by law required and to act under s 173A or s 294 of the Criminal Procedure Code (FMS Cap 6) instead. E

Committing the offence of armed gang robbery at night in the home of a law abiding citizen is a sufficiently grave act that requires the sessions court to place public interest above all other personal considerations of the appellant. F

The session court judge was therefore justified to have rejected the plea that the appellant be bound over under s 173A or s 294 of the Criminal Procedure Code (FMS Cap 6). G

THE CONCLUSIONS MADE BY THE SESSIONS COURT JUDGE

(1) The fact that no weapons was recovered at the scene was understandable as of the gang of five only the appellant and the second accused were apprehended at the scene. H

(2) The sum of RM 50,000 placed by the prosecution on the value of the articles was not unreasonable as they include eight rings and in any case was meant only as an estimate. So were the values placed on the other two charges — they were mere estimates. The sessions court judge was right to have treated the robbery as not of a minor nature although his use of the colloquial word 'quite big time robberies' was inaccurate and inappropriate. I

THE SENTENCE — PRINCIPLE TO BE FOLLOWED

See *Mallal's Criminal Procedure* (5th Ed, 1998) — When interference with sentence justified:

> [10478] It is the established principle that an appellate court should be slow to interfere or disturb a sentence passed by a court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. The mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence (*PP v Mohamed Nor & Ors* [1985] 2 MLJ 200. See also *Bhandulananda Jayatilake v PP* [1982] 1 MLJ 83 (FC)). An appellate court will not interfere unless it is satisfied that: (i) the sentencing judge has made the wrong decision as to the proper factual basis for sentence; (ii) the sentencing judge has erred in appreciating the materials placed before him; (iii) the sentencing judge has passed a sentence which is wrong in principle; and (iv) the sentencing judge has imposed a sentence which is manifestly excessive (*Tan Koon Swan v PP* [1987] 2 MLJ 129; [1986] 1 SLR 126).

WAS THE SENTENCE EXCESSIVE?

The grounds of decision of the sessions court judge indicates that he had given due consideration to the probation report, the fact that the appellant had pleaded guilty, that when the offence was committed the appellant was only 20 years old, the plea in mitigation — all of which he had quite correctly balanced against the fact that the gang of robbers were armed in all the three cases, the amount involved in all the three robberies and above all public interest.

The maximum sentence set for an offence of gang robbery under s 395 of the Penal Code is 20 years. The offender is also liable to be whipped.

The sentence of six years imprisonment and five strokes of the rotan imposed by the sessions court judge, taking into consideration two other offences of the same nature committed by the appellant, would not under the circumstances be excessive and therefore should not be disturbed.

IRREGULARITY IN THE CHARGE

Both parties agree that a charge of gang robbery under s 395 of the Penal Code need not be read with s 34 of the Penal Code to incorporate the element of common intention. This is so because gang-robbery is defined under s 391 as a robbery committed by five or more persons conjointly. The incorporation of s 34 of the Penal Code was under the circumstances superfluous.

The slight irregularity should not however affect the legality of the charge as it is clear the appellant could not have been misled by the redundant use of s 34. The saving grace is provided under s 156 of the Criminal Procedure Code (FMS Cap 6) which reads as follows:

No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded, at any stage of the case, as material unless the accused was in fact misled by such error or omission.

The appeal is dismissed.

Appeal dismissed.

Reported by Jafisah Jaafar